88-1918

NO.

Supreme Court, U.S.
FILED
MAY 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1988

LOUISIANA SOCIETY OF INDEPENDANT ACCOUNTANTS and DALL HALLIGAN EDEN
Petitioners

vs.

STATE OF LOUISIANA, THROUGH THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA and THE STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE FOURTH CIRCUIT STATE OF LOUISIANA

C. ELLIS HENICAN, JR.
JUDITH E. DECK
HENICAN, JAMES & CLEVELAND
111 Veterans Blvd.
P. O. Box 19300
New Orleans, Louisiana 70179
Telephone: (504) 837-8080

ATTORNEYS FOR PETITIONERS:
Louisiana Society of Independant Accountants,
(Formerly Accountants' Association of Louisiana) and
Dall Halligan Eden

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

The question presented is whether La. R.S. 37:72, as interpreted by the Court of Appeals for the Fourth Circuit, State of Louisiana, to prohibit the expression of any opinion by non-certified accountants concerning financial matters, is in violation of the First Amendment to the constitution of the United States in that such prohibition impairs freedom of speech.

PARTIES

The Louisiana Society of Independant Accountants ("L.S.I.A.") is a Louisiana non-profit corpporation whose members have been engaged in the practice of accounting for two years or more, most of whom do not hold Certified Public Accountant ("C.P.A.") certificates from the State of Louisiana. This organization was formerly known as the Accountants' Association of Louisiana.

Dall Halligan Eden ("Mrs. Eden") is an independant accountant and a member of the L.S.I.A.

The State Board of Certified Public Accountants ("the Board" or "the State Board") is the examination and licensing authority for certified public accountants in the State of Louisiana and consists of five members, each of whom is required to be (and at all times has been) a certified public accountant.

TABLE OF CONTENTS

Page

Question Presented i

Listing of Parties ii

Table of Contents iii

Table of Authorities v

Petition for Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana 1

Opinion Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 5

Reasons for Granting the Writ 10

A. Freedom of Speech 12

B. The Fourth Circuit Court's Reliance on *Lowe v. S.E.C.* 23

Conclusion 28

APPENDICES:

Appendix A
Decisions of the Court of Appeals for the Fourth Circuit, State of Louisiana, 1986 . . . . . A-1

Appendix B
Report of the Commissioner and Judge *ad hoc* A-13

Appendix C
Exceptions to Report of Commissioner and Judge *ad hoc* A-16

Appendix D
Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana A-19

TABLE OF CONTENTS (continued)

Page

Appendix E
Decision of the Court of Appeals for the Fourth Circuit, State of Louisiana, 1988 ..... A-21

Appendix F
Denial of Rehearing by the Court of Appeals, Fourth Circuit, State of Louisiana A-29

Appendix G
Denial of Writ of Certiorari of the Louisiana Supreme Court A-30

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION

First Amendment ..... *passim*

Fourteenth Amendment 3,15

STATUTES

28 U.S.C. §1257 (3) 2

Louisiana Act 510 of 1979 5

La. R.S. 37:72 3,7,8,9,10

La. R.S. 37:77(B) 5

REGULATIONS

7 C.F.R. 102 21,22

7 C.F.R. 1421 22

CASES

Accountants' Association v. State of Louisiana, 487 So.2d 155 (La. App. 4th Cir. 1986) 6,7,8,10

Accountants' Association v. State of Louisiana, on remand, 533 So.2d 1251 (La. App. 4th Cir. 1988) .. 9,23

Accountants' Society of Virginia v. Bowman, 860 F.2d 602 (4th Cir. 1988) 21

Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940) 17

Comprehensive Accounting Service Co. v. Maryland State Board of Public Accountancy, 284 Md.474, 397 A.2d 1019 (1979) 20

Kunz v. New York, 340 U.S. 290, 95 L.Ed. 280, 71 S.Ct. 312 (1951) 17

Lovell v. Griffin, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938) 17

Lowe v. S.E.C., 472 U.S. 181, 105 S.Ct. 557, 86 L.Ed.2d 130 (1985) ..... *passim*

TABLE OF AUTHORITIES (continued)

CASES: Page

Marks v. City of Roseberg, 670 P.2d 201 (Or. App. 1983) 15

Martin v. Struthers, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862 (1943) 17

NAACP v. Button, 371 U.S. 415, 85 S.Ct. 328, 9 L.Ed.2d 405 (1963) 16,17

Riley v. National Federation of the Blind of North Carolina, 487 U.S. ____, 101 L.Ed.2d 669, 108 S.Ct. ____ (1988) 25,26,28

Saia v. New York, 334 U.S. 558, 92 L.Ed. 1574, 68 S.Ct. 1148 (1948) 17

Schneider v. Irvington, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1940) 17

Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) 17

Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 703 P.2d 1119 (Ca. 1985) 15,18

Talley v. California, 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960) 17

U.S. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) 15

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 63 L.Ed.2d 73, 100 S.Ct. 826 (1980) 18

OTHER

Shiffrin, *"The First Amendment & Economic Regulation: Away From a General Theory of the First Amendment,"* 78 Nw.U.L.Rev. 1212, 1273, 1276 (1983) 15

Tribe, *American Constitutional Law* (1988), pp. 833-834 16

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LOUISIANA SOCIETY OF INDEPENDANT ACCOUNTANTS and DALL HALLIGAN EDEN
Petitioners

vs.

STATE OF LOUISIANA, THROUGH THE ATTORNEY GENERAL OF THE STATE OF LOUISIANA and THE STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA
Respondents

PETITION FOR WRIT OF CERTIORARI,
TO THE COURT OF APPEAL
FOR THE FOURTH CIRCUIT,
STATE OF LOUISIANA

Petitioners, the Louisiana Society of Independent Accountants (formerly Accountants' Association of Louisiana) and Dall Halligan Eden, original plaintiffs in this suit, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, entered in this proceeding on October 27, 1988.

OPINION BELOW

The first opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, 1986, appears as Item 1 in the Appendix hereto. The Report of the Commissioner and Judge *ad hoc* appears as Item 2; the Exceptions to Report of Commissioner and Judge *ad hoc* appears as Item 3; the Judg-

ment of the Civil District Court for the Parish of Orleans, State of Louisiana, appears as Item 4; the second opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, 1988 (on remand for review of the constitutional issues) appears as Item 5; the Denial of Rehearing by the Court of Appeals, Fourth Circuit, State of Louisiana appears as Item 6; and the Denial of Writ of Certiorari of the Louisiana Supreme Court appears as Item 7.

JURISDICTION

The decision of the Court of Appeal, Fourth Circuit, State of Louisiana, was rendered on October 27, 1988 (533 So.2d 1251). A Petition for Rehearing was timely filed but was denied on December 14, 1988. A Petition for Writ of Certiorari was timely filed with the Supreme Court of Louisiana, but was denied on February 24, 1989 (538 So.2d 593). This petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). The federal question of petitioners' freedom of speech rights being violated was raised in the trial level in the Civil District Court for the Parish of Orleans, State of Louisiana, as well as in the Court of Appeal, Fourth Circuit, State of Louisiana and the Supreme Court of Louisiana.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LOUISIANA REVISED STATUTES
TITLE 37, SECTION 72

§ 72. Special definition; public accounting; exceptions

A. As used in this Chapter, the "practice of public accounting" or "practicing public accounting" means:

(1) Offering to perform, or performing for the public, accounting or accounting related services while holding one's self out as a certified public accountant or as a firm of certified public accountants; or

(2) Signing or affixing one's own or firm name, or other name used in one's profession or business, to any opinion or certificate attesting in any way to the reliability of any representation or estimate in regard to any person or organization, embracing financial information or facts respecting compliance with conditions established by law or contract, including but not limited to statutes, ordinances, regulations, grants, loans, and appropriations, together with any wording accompanying or contained in such opinion or certificate which indicates (a) that he is an accountant or auditor or that the firm is composed of, or

employs, accountants or auditiors, or (b) that he has expert knowledge in accounting or auditing or that the firm is composed of or employs persons having expertise in accounting or auditing; or

(3) Offering to the public or to prospective clients to perform, or actually performing on behalf of clients, professional services that involve or require an audit, or examination of financial records leading to the expression of a written opinion concerning same; or

(4) Maintaining an office for the transaction of business as a certified public accountant.

B. Public accounting shall not be construed, however, to include holding one's self out to the public as competent to perform, offering to perform or actually performing bookkeeping services; provided that such services do not include any function, service, activity, conduct, practice or representation defined or included in Subesection A of this Section. Nor shall public accounting include the preparation of tax returns, provided that the preparer does not indicate, in connection with his signature or otherwise, that he is a public accountant or certified public accountant. Nor shall public accounting include any accounting practice, service or function performed by the duly elected or appointed Legislative Auditor in the discharge of the powers, duties and functions committed to his office by Article XIV, Section 27(C) of the Louisiana Constitution of 1974.

C. Nothing in this Chapter shall be construed to prevent the employment of uncertified or unlicensed persons by a licensed certified public accountant or by a firm of licensed certified public accountants, provided that such uncertified or unlicensed employees work under the control

and supervision of licensed certified public accountants and such employees are not held out to the public, and do not hold themselves out to the public, as engaged in the practice of public accounting.

Acts 1979, No. 510, § 1.

STATEMENT OF THE CASE

Louisiana Act 510 of 1979 (La. R.S.37:71 through 37:87) is the statute which regulates the accounting profession in Louisiana. By this statute, the legislature prohibited any person from engaging in "the practice of public accounting" without a current C.P.A.'s license. La. R.S. 37:77(B).

Persons without C.P.A.'s licenses ("non-C.P.A.'s") are free to perform any acts which do not fall within "the practice of public accounting" as defined by the legislature. However, if they "practice public accounting" — as the Legislature defines it — they may be ordered to cease and desist and be enjoined[1]; subjected to fines, attorney's fees and court costs[2] and sent to prison for five months[3].

This litigation proceeded in two stages. On the first appeal, the Court of Appeal for the Fourth Circuit, State of Louisiana ("the Court of Appeal"), decided whether the "review report" of the type issued by petitioners falls within the prohibition of the Louisiana statute. The Court concluded that the Louisiana statute prohibited "any opinion" by an uncertified accountant concerning financial information. Therefore, it forbade the review report in this

---

[1] La. R.S. 37:85(A) and (B)

[2] La. R.S. 37:85(D)

[3] La. R.S. 37:83

case. The Court refused to reach the constitutional issues and remanded for trial court determination. *Accountants' Association v. State of Louisiana*, 487 So.2d 155 (La. App. 4th Cir. 1986).

The phrase, "the practice of public accounting," was interpreted by the Court of Appeal to include the "expression of opinion by non-licensed accountants." *Id.*, 487 So.2d 155 at 159. The precise statement which the Court considered to be prohibited as the expression of an opinion (and therefore the practice of public accounting) was the statement that the non-licensed accountant was "not aware of any material modifications that should be made to the accompanying financial statements. . .to be in conformity with generally accepted accounting principles." *Id.*

The essential factual background was as follows: one of L.S.I.A.'s members (Durham, Rohr & McDaniel) performed a review of the records of one of its clients as it had done for many years. Upon completing the review, it signed a five-sentence certificate (a "review report") which stated that it had reviewed certain documents; that all information in those documents was the representation of management; that it expressed no opinion regarding the financial statements as a whole and that it was unaware of any modifications required to make them conform to accepted accounting principles.

The certificate read in full as follows:

> "We have reviewed the accompanying balance sheets of _____ Co., Inc. as of October 31, 1981 and October 31, 1980 and the related statements of income, retained earnings, and changes in financial position for the years then ended, in accordance with established standards. All information included in these financial

statements is the representation of the management of _____ Co., Inc.

A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based upon our review, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.

Respectfully submitted,

DURHAM, ROHR & McDANIEL"

The Court of Appeal based its decision on its understanding of the "intention" of the Legislature. Although La. R.S. 37:72(A)(2) prohibited expressly only a limited category of opinions and certificates, the Court of Appeal concluded that it was the "overall intent"of the statute to prohibit *any opinion* or certificate by a non-C.P.A. In the language of the court:

> "La. R.S. 37:72(A)(2) prohibits signing one's name to *any opinion* or certificate;. . .Thus, the thrust of our inquiry is to determine if plaintiffs' review function violates the statute's intended *prohibition of an expression of opinion* by non-licensed accountants." (Emphasis supplied).

487 So.2d 155, 159.

Having found that the "general intent" of this criminal statute was to condemn the expression of *any opinion* by a non-C.P.A., the court then looked at the review report in question to see whether the certificate contained "any opinion." The court seized upon the last paragraph of the certificate, quoted in full at pp.6-7 , *supra*, where the author stated that it was not aware of any modifications that need be made to the documents to conform to generally accepted accounting principles. The Court of Appeal held that such a statement of non-awareness is an opinion and therefore prohibited by the statute.

In sum, the court held that since no opinion regarding financial affairs may be stated by a non-C.P.A., the statement by a non-C.P.A. that he was not aware of required modifications was an opinion and therefore prohibited as criminal by La. R.S. 37:72(A)(2). 487 So.2d 155, 159.

The court refused to consider the constitutional issues which had been raised by plaintiffs and remanded the case to the trial court to determine them. After a petition for rehearing was refused, the Supreme Court of Louisiana denied writs. 492 So.2d 1219 (1986).

The case was remanded to the trial court for consideration of the constitutional issues. 487 So.2d at 160.

On remand, the parties submitted the matter on the transcript from the first hearing. No new evidence was submitted. In a report issued July 14, 1987, the Commissioner and Judge *ad hoc* recommended that La. R.S. 37:72(A)(2) be declared unconstitutional in that it curtails or restrains freedom of speech. In pertinent part, the Commissioner's report states:

"Anyone who expresses an opinion in writing

relating to figures would fall into the area enclosed exclusively for CPAs. Upon the presentation made no compelling governmental interest has been shown especially as it relates to the 'review' function, which would suffice to override the Constitution."

Appendix 2

In a decision rendered December 8, 1987 (Appendix 4) the Civil District Court ruled that neither La. R.S. 37:72(A)(2) nor any other provision of the Public Accountancy Law challenged by the plaintiffs is unconstitutional. No reasons were assigned by the trial judge in refusing the Commissioner's factual findings.

Petitioners appealed to the Court of Appeal for the Fourth Circuit, State of Louisiana, which affirmed on October 27, 1988 (Appendix 5). *Accountants' Association of Louisiana v. State of Louisiana*, 533 So.2d 1251 (La. App. 4th Cir. 1988).

On this second appeal, the Court of Appeal held that the statute (as interpreted to prevent the expression of "any opinion" by an uncertified accountant concerning financial information) was not in violation of the First Amendment. The court relied on its understanding of Justice White's concurring opinion in *Lowe v. S.E.C.*, 472 U.S. 181, 105 S.Ct. 557, 86 L.Ed.2d 130 (1985).

The Court rejected applicants' argument that the statute unconstitutionally restricts their First Amendment right to freedom of speech on the ground that the criminalization of the statement of "any opinion" by a non-certified accountant "... is not so much speech as it is the manner in which the accountant expresses himself in the practice of his profession..." 533 So.2d at 1254.

Applicants applied timely for rehearing, which application was denied on December 14, 1988. No reasons were assigned. The Supreme Court of Louisiana denied writs on February 24, 1989 with one Justice dissenting. 538 So.2d 593.

REASONS FOR GRANTING THE WRIT

The issue facing this Court is simple: may a state, while purporting to regulate a profession, prohibit a professional who is authorized to perform specific work from truthfully reporting to his client on that work under threat of criminal penalty?

In its first opinion, the Fourth Circuit Court of Appeal interpreted La. R.S. 37:72 to forbid all opinions by uncertified accountants regarding financial statements.

It is clear that the appellate court's interpretation of the "overall intent" of the Legislature, which it believed was to ban the expression of any opinion by a non-certified accountant, was crucial to its holding. The court summed up as follows:

> "*Considering our interpretation of the overall intent of the public accountancy law,* we hold, that insofar as the document entitled 'Accountants' Review Report' under consideration in this case is concerned, its use by unlicensed accountants is prohibited by La. R.S. 37:72(A)(2)." (Emphasis supplied)
>
> 487 So.2d 155, 159-60.

As this Court is well aware, when a fundamental right is restricted, the burden is on the state (1) to overcome "strict scrutiny" and demonstrate that there is a "compell-

ing need" for infringing on the fundamental right *and* (2) to establish that there exists no less restrictive means of so doing. This is a heavy burden indeed, under this Court's decisions. The cases affirming that burden are legion and well known.[4]

The respondents did not attempt to meet this heavy burden of proof. Although the case was remended to give the respondent every chance to carry the burden, it offered no evidence whatever to show that there was any compelling need for the state to restrict the issuance of review reports to licensed certified public accountants. It put on no evidence at all of a compelling need to invade fundamental constitutional protection.

To the contrary, all the evidence at trial on the issue of "compelling need" was put on by the petitioners and was not contradicted by the respondents. The testimony was clear. It was uncontradicted that if only licensed C.P.A.'s may issue review reports, then uncertified accountants will be unable to tell their clients what has been done, the public will not receive improved services, and the public (forced to hire more expensive C.P.A.'s) will pay higher prices for the same service. (III Tr. 120-121, 144-147 and IV Tr. 8-9). It is plain from the unchallenged evidence that there is, in truth, no compelling need to drastically restrict the constitutional rights of the petitioners by preventing them from making truthful statements about their reviews.

The burden of demonstrating that there was a "compelling need" for the prohibition on speech and that this need could not be met by any less restrictive means was on

---

[4] That the state must carry the burden of showing "compelling need" and "no less restrictive means" under the First Amendment is set out at pages 15-18, *infra*.

the State. It has failed in meeting this burden. It offered no such evidence. It never has claimed that any statement or phrase in the review report, or even the entire review report, is false, misleading or deceptive or that its author was not fully competent to perform the review or make the report.

A. Freedom of Speech

The petitioners claim a violation of the First Amendment to the United States Constitution because the statute in question, as interpreted in the Court of Appeal's first opinion, violates their guarantee of freedom of speech. The essence of this claim is that the statutory prohibition on the use of the review report by uncertified accountants prevents them from truthfully reporting on work they are lawfully permitted to perform.

The Louisiana statute permits the performance of reviews by uncertified accountants and there was no evidence or claim that a review could not be performed by Durham, Rohr & McDaniel. The statute does not purport to prevent an accountant from having knowledge of accounting and its practice sufficient to perform a review of financial statements, even though he does not have a C.P.A. license. Indeed, there is no evidence in the record that Durham, Rohr & McDaniel did not have sufficient knowledge accurately to examine the financial records of a customer or client sufficient to perform a review, and the Board did not enjoin it from performing reviews. The statute does not prohibit the review itself.

The Louisiana statute, as interpreted by the Fourth Circuit, forbids the uncertified accountant from expressing to his client "any opinion" regarding a financial statement, including the truthful statement that he knows of no changes required to make the statement conform to ac-

cepted accounting principles. The statute as so interpreted severely limits the uncertified accountant's freedom of speech. It tells the uncertified accountant that although he may perform the review, he may not tell his client what he found in his review and that he knows of no changes required.

While we do not contend that freedom of speech is absolute, it is a fundamental right which cannot be proscribed except in strictly limited circumstances.

Should this statute be upheld, then the freedom to state one's opinion, or to state that one has an opinion or *no* opinion, is meaningless in an accounting context. According to the Court of Appeal, although uncertified accountants may perform reviews, they then may not state that they have done so, and may not make known their findings. They may neither express an opinion nor state that they have no opinion. A greater curtailment of speech would be difficult to imagine. It is difficult in the extreme to conceive of any public purpose being so served, if indeed there be any.

The review report in this case clearly states, in unmistakable terms, (1) that *no opinion* is given regarding the financial statements taken as a whole, and (2) that all the information presented is the representation of management.

A statute whose "plain meaning" is that an uncertified accountant may not express "any opinion" and may not disavow "any opinion" and may not state his level of awareness, strikes at the very heart of free expression. To uphold such a restriction, as the lower courts have done, would emasulate the freedom of speech and expression guaranteed to the petitioners.

Under established principles, the court should give strict scrutiny to a legislative effort to impinge so severely upon the freedom of speech. It becomes the burden of the state to show that the infringement on freedom of speech was required by a "compelling state interest."

In this case, the Board has failed to sustain its burden. Although the case was remanded to the trial court to give the Board a chance to meet this heavy burden, no evidence was introduced in the trial court to show that any citizen has been harmed by an uncertified accountant's having issued a review report. There was no "malpractice crisis" among uncertified accountants. There has been *no* testimony to show a "compelling state interest." The contrary was shown to be true.

At trial, it was established that in some small Louisiana towns, and in more rural and agricultural communities, there are no C.P.A.'s (III Tr. 152). Even where C.P.A.'s are readily available, uncertified accountants perform a vital function in rendering uncomplicated accounting services to those individuals and businesses not requiring, or unable to afford, the full-blown audit provided by C.P.A.'s. In addition, they provide these services at a more reasonable price to the consumer (III Tr. 97, 98, 121, 148-148, 168).

As established by the uncontradicted testimony of Dr. James J. McLain, Professor of Economics at the University of New Orleans, the public will suffer serious economic damage by reason of the anti-competitive effect of a restriction on accountants. A holding that uncertified accountants may express no opinion will in one fell swoop effectively drive them out of business and deprive their

clients of their services.[5]

The First Amendment to the United States Constitution guarantees that Congress shall make no law abridging the freedom of speech. This guarantee is extended to the states by incorporation through the Fourteenth Amendment. As explained by a leading commentator:

> "In First Amendment cases, the Supreme Court is least likely to take into account governmental interests which, although conceivable, were not actually considered by the relevant decision maker. The court also requires an especially close

---

[5] Other state courts, applying their state constitutional provisions of free speech, have gone even further to strike down efforts by the states to regulate professional activities in more difficult cases. For example, the California Supreme Court in *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa*, 703 P.2d 119 (Ca. 1985), nullified on state constitutional free speech grounds a local law outlawing the practice of astrology and of fortune-telling arts for compensation.

Likewise, in *Marks v. City of Roseberg*, 670 P.2d 201 (Or. App. 1983), the Oregon Court of Appeal held that an occult arts ordinance violated the state's free speech guarantee. Surely if astrology, fortune telling and the occult arts are protected by the First Amendment, uncertified accountants' truthful statements are protected a *fortiori*.

Decisions of this type are reviewed in Shiffrin, "The First Amendment & Economic Regulation: Away From a General Theory of the First Amendment," 78 Nw.U.L.Rev. 1212, 1273, 1276 (1983). For example, in the *Marks* case, *supra*, the court refused to categorize fortune-telling as less-protected commercial speech. The court ruled that the municipal ordinance failed "both the least restrictive means tests and the balancing of interests tests announced in *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)." The California Supreme Court in *City of Azusa, supra*, likewise found the ordinance overbroad. The court, of course, noted that a well-drafted law prohibiting fraud in fortune-telling could comport with California free speech principles.

> nexus between ends and means. A statute must be narrowly drawn so that a challenged act of government is clearly an efficacious means to achieve permissible objectives of government and is narrowly aimed at those permissible objectives so as not unnecessarily to reach expressive conduct protected by the First Amendment. The test for a content based restriction . . . is often described as requiring that ' the government . . . show that the regulation is a precisely drawn means of serving a compelling state interest.' *Consolidated Edison Company v. Public Service Commission,* 447 U.S. 530 (1980). Whenever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary. In addition, the Court does not refrain, as it typically does in other contexts, from substituting its own factual judgments for those made by other courts, administrative agencies, or legislative bodies. In short, governnment must come forward with sufficient proof to justify convincingly its abridgement of the constitutional right to speak, in terms consistent with the basic theory of free expression. In general, that will be impossible unless government can persuasively show that a harm would be prevented by the abridgement but could not have been prevented by dialogue."

Tribe, *American Constitutional Law* (1988), pp. 833-834.

Since freedom of speech is a primary fundamental right, strict judicial scrutiny of the statute is imposed. See, *NAACP v.Button,* 371 U.S. 415, 85 S.Ct. 328, 9 L.Ed.2d 405 (1963). The state has the burden of showing a compelling reason for passing the statute. The burden of proof rests with the state. This Court has held these propositions to be basic in numerous cases.

For example, in *Shelton v. Tucker*, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960), Justice Stewart's majority opinion stated:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement musts be viewed in the light of less drastic means for achieving the same basic purpose."
>
> 364 U.S. 479, 488, 5 L.Ed.2d 231, 237

The Court reviewed, in this connection, its holdings in *Lovell v. Griffin*, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938); *Schneider v. Irvington*, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1940); *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900 (1940) ("the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom"); *Talley v. California*, 362 U.S. 60, 4 L.Ed.2d 559, 80 S.Ct. 536 (1960); and cited its decisions in *Martin v. Struthers*, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862 (1943), *Saia v. New York*, 334 U.S. 558, 92 L.Ed. 1574, 68 S.Ct. 1148 (1948), and *Kunz v. New York*, 340 U.S. 290, 95 L.Ed. 280, 71 S.Ct. 312 (1951).

In *N.A.A.C.P. v. Button, supra*, Justice Brennan's majority opinion eloquently set forth the standard of the government in restricting fundamental freedoms:

> "The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer

to the constitutional claims asserted by petitioner to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."

371 U.S. 415, 438-439, 9 L.Ed. 2d 405, 421 (citations omitted)

In that same decision, this Court further stated that:

"Broad prophylactic rules in the area of free expression are suspect. See, e.g., *Near v. Minnesota,* 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625; *Shelton v. Tucker,* 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247; *Louisiana ex rel. Gremillion v. National Asso. for Advancement of Colored People,* 366 U.S. 293, 6 L.Ed.2d 301, 81 S.Ct. 1333. Cf. *Schneider v. State,* 308 U.S. 147, 162, 84 L.Ed. 155, 165, 60 S.Ct. 146. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

371 U.S. 415, 438, 9 L.Ed.2d 405, 421.

More recently, in *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct.826, 63 L.Ed.2d 73 (1980), this Court struck as overbroad an ordinance prohibiting solicitation of contributions by charitable organizations that did not use at least 75 percent of their receipts for "charitable purposes," other than administrative expenses and overhead. The interest advanced by the government was "protecting the public from fraud, crime, and undue annoyance." This Court found that stated interest "only peripherally promoted by the 75 percent requirement and could be sufficiently served by

measures less destructive of First Amendment interests." 480 U.S. 621, 636.

In this case, the respondents introduced no evidence and established no need whatever for the state to prohibit an accountant, who is allowed to perform a review, from reporting to his client that he has done so, or from expressing the truthful statement that, as far as the accountant is aware, there is nothing required to have the statement conform to generally recognized accounting principles.

The statement in this case was not shown to be false or misleading. The performing of the review is permitted by statute. There was no need shown, and surely no compelling need, to completely restrict the freedom of speech of the uncertified accountants involved.

Respondents argued below that although the Legislature saw fit to exclude reviews themselves from those functions exclusively the province of certified accountants, it intended to restrict the dissemination of truthful information concerning lawful work, and to make it a crime for an uncertified accountant to express his state of mind, lack of opinion, and his level of awareness concerning the need for changes to the reviewed financial information.

The Board in the first appeal argued that the state's interest to be served by this restriction was in "protecting the public from ignorance and incapacity". However, at the hearing below, when it had a chance to offer evidence, the Board offered no evidence that such ignorance or incapacity exists among uncertified accountants in general or petitioners in particular, or that restricting the language of a review report in any manner serves that interest. It has made no claim and has offered no evidence that a less restrictive means would not adequately serve that interest.

It has, in fact, made no showing that the asserted state interest is either valid or compelling.

The draconian cease and desist order issued by the Board prevents the expression of "*any* opinion . . . or *denying* an opinion." As such, the petitioners' freedom of speech is restricted and a fundamental right is implicated. The burden of proof is on the Board to justify that prohibition and overcome strict scrutiny. It has failed to prove that the state's asserted interest is a compelling one requiring such a drastic restriction on the applicants' constitutional rights.

There was no showing that the public has been harmed in any manner by unlicensed accountants' use of review reports and the Court of Appeal did not find any danger of such harm. Indeed, the only segment of the public that the statute protects is the certified public accountants in this state who stand to gain a considerable amount of income as a result of the constraints placed on unlicensed accountants.

The respondents offered no evidence to prove that there was any justification for so drastically restricting applicants' right to free speech.[6]

---

[6] The Maryland Court of Appeals, in *Comprehensive Accounting Service Co. v. Maryland State Board of Public Accountancy*, 284 Md. 474, 397 A.2d 1019 (1979), considered the constitutionality of a state statute prohibiting an uncertified accountant from describing its services as "accounting" or holding itself out to the public as an "accountant."

Reversing the trial judge, the court held that although the state had the ultimate right to regulate the practice of public accounting and restrict the use of words such as "certified public accountants" to those certified by the state, the statute violated the First Amendment free speech rights of the corporation since the state had failed to make a showing of a compelling state need underlying the enactment of the statute.

Moreover, the state could not, consistent with the First Amend-

The prohibition on statements made in rendering lawful services must be considered an imposition on speech and not a mere incident to the regulation of the profession. Petitioners are not prohibited from performing reviews. They are denied, however, from using language accurately representing what they have done in performing these lawful services. Such prohibitions are clearly prohibitions on speech, not prohibitions on conduct of an occupation in which the restrictions on speech are merely unimportant or incidental.[7]

In addition, the federal government, through the Department of Agriculture, has decided that uncertified accountants are qualified to perform not only reviews, but even audits, and to render reports thereon. See 7 C.F.R.102, which states in part:

> "The use of certified public accountants could be overly restrictive, adding to the cost and perhaps the immediate ability of warehousemen to comply. Statements may now be 'reviewed' or 'audited' by an independent public accountant . . ."

(footnote 6 continued.)
ment, choose the most drastic remedy. Because the free flow of truthful information is so carefully protected, the courts require remedial relief for proved deceptions to be as narrow as possible.

[7] Petitioners are aware of the decision upholding Virginia's regulation of review reports by the United States Court of Appeals for the Fourth Circuit in *Accountants' Society of Virginia v. Bowman*, 860 F.2d 602 (4th Cir. 1988) a similar but distinguishable case. In *Bowman*, a United States Court of Appeal was dealing with a different statutory scheme and a different set of facts. The challenge was not based on the same grounds as the case before this Court. In addition, the United States Fourth Circuit erroneously relied in part on Justice White's minority opinion in *Lowe v. SEC*, as will be shown *infra*. Petitioners believe this decision is inapplicable to the facts and the statutory scheme presented in the matter before this Court, and that the Court did not consider the arguments presented in this application.

Department of Agriculture, 7 C.F.R. 102.6(c)

Likewise, the Federal Commodity Credit Corporation allows both audits and reviews, and reports thereon, by uncertified accounts [7 C.F.R. 1421.5551(d)(ii)(A)]. The federal government permits and encourages uncertified accountants to perform a wide range of accounting and accounting-related functions, including preparing federal individual, fiduciary and corporate tax returns of all types, appearing before the Internal Revenue Service as registered agents, certifying all types of financial statements for federal licensing of grain warehouses (7 C.F.R. 102 and 7 C.F.R. 1421), and providing statements for the Small Business Administration.

As evidenced by these policies, the federal government recognizes the special and valued role uncertified accountants play in the smooth economic functioning of small businesses and agrarian communities. Its acceptance of uncertified accountants, and the product of their work, acknowledges the expense and difficulty of availability of C.P.A.'s in these areas, and implicitly or explicitly approves the use of the services of uncertified accountants for small businesses and rural or agricultural concerns.

The United States, through the Department of Agriculture and the Commodity Credit Corporation, has concluded that reviews and audits may be performed by independent accountants and not only by C.P.A.'s. Yet if a review were performed in Louisiana by a non-C.P.A. as authorized by the federal government, the independent accountant would be subject to prosecution as a criminal. This situation raises even more serious constitutional issues.

If the Louisiana statute is finally approved, an uncertified accountant in Louisiana would be authorized by the

Department of Agriculture and Federal Commodity Credit Corporation to perform reviews (and audits as well) and report on them. But under the statute, such activity would be a crime in Louisiana, punishable by fine and imprisonment.

There is no compelling need for such a result.

B. The Fourth Circuit Court's Reliance on *Lowe v. S.E.C.*

The Louisiana Court of Appeal, in rejecting out of hand petitioners' First Amendment freedom of expression claim, relied primarily, if not solely, on its understanding of an analysis by Justice White in a concurring opinion in *Lowe v. S.E.C.*, 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985).

As interpreted by the Court of Appeal, Justice White's opinion was that the First Amendment should not apply and no "compelling need" must be shown by the state, where a "personal nexus" between professional and client exists. Where such a relationship exists, the Court should rule that governmental activity limiting First Amendment rights is *only* the regulation of a profession and not a restriction on free speech. *Lowe*, 472 U.S. 181, 232; 86 L.Ed.2d 130, 164; *Accountants' Association of Louisiana v. State of Louisiana* (". . . we find that the prohibition against the rendering of such reports by uncertified accountants clearly qualifies as a 'generally applicable licensing provision limiting the class of persons who may practice the profession,' and as such is not a limitation upon plaintiffs' freedom of speech.") 533 So.2d 1251, 1255.

We do not believe that Justice White meant what the Court of Appeal held. If Justice White's opinion, fairly con-

strued, meant that a state may violate the First Amendment in regulating professions, such an opinion clearly would represent the minority. The least that can be said is that Justice White recognized that his position was not in harmony with the majority in *Lowe*. As Justice White stated in that opinion:

> "One does not have to read the Court's opinion very closely to realize that its interpretation of the Act is in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of newsletters by unregistered advisors."
>
> *Lowe*, 472 U.S. 181, 226 86 L.Ed.2d 130, 160 (White, J., concurring).

Indeed, the majority, which avoided a holding on the First Amendment issue, clearly indicated its belief (contrary to the Court of Appeal's interpretation of Justice White's position) that the regulation being reviewed had serious First Amendment problems. The majority stated:

> "Moreover, because we have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 513, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984), *it is difficult to see why the expression of an opinion about a marketable security* should not also be protected."
>
> *Lowe*, 472 U.S. 181, 210, 86 L.Ed.2d 130, 150, fn. 58 (Emphasis added).

Indeed, there is no basis in logic or policy which would protect First Amendment rights when the speaker is

expressing the same opinion to one person: his client. It is not surprising that the *Lowe* majority rejected such a proposition.

A later Supreme Court decision also belies the Court of Appeal's conclusion. It was not discussed by the Fourth Circuit.

In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S.____ , 101 L.Ed.2d 669, 108 S.Ct.____ (1988) the Court considered a state's regulation of the profession of fund raising. In that case, North Carolina required, among other things, that professional fund raisers disclose to potential donors, before an appeal for funds, the gross percentage of funds retained in prior charitable solicitations.

Under the Court of Appeal's analysis in our case, such a regulation of speech by a professional fund raiser would be not a First Amendment question, but merely the regulation of a profession. Indeed, the dissent in *Riley* so argued.[8]

However, the majority had no trouble rejecting such an argument. It said:

> "Nor are we persuaded by the dissent's assertion that this statute merely licenses a profession, and therefore is subject only to rationality review. Although Justice Jackson did express his view that solicitors could be licensed, a proposition not before us, he never intimated that the licensure was devoid of all First Amendment implication. *Thomas v. Collins*, 323 U.S. 516, 544-545, 89 L.Ed. 430, 65 S.Ct. 315 (1945) (Jackson, J. concurring.)"

---

[8] See, 487 U.S. _____, 101 L.Ed.2d at 700, dissent by Rehnquist, C.J. and O'Connor.J.

101 L.Ed. 2d 669, 692 fn. 13

It is most interesting to note that Justice White joined with the majority in *Riley* which applied the strict scrutiny doctrine to the statute whereby a state undertook to regulate speech by a member of the fund raising profession.

Therefore, it is clear that the Fourth Circuit's reading of Justice White's minority opinion, so as to permit a state to prohibit the expression of any opinion by uncertified accountants, is contrary to the analysis by the majority of this Court.

As shown above, the strict scrutiny standard required by *Riley* and a host of other decisions clearly demonstrates that the restriction of petitioners' freedom of expression is unconstitutional.

A fair examination of Justice White's concurring opinion in *Lowe*, supra, shows that Justice White's analysis would not allow the statute as interpreted by the Court of Appeal to stand.

The concurring opinion by Justice White in *Lowe* concluded that there are certain professional activities which may be regulated notwithstanding the First Amendment. For the conditions he would impose, we quote his opinion as follows:

> "These ideas help to locate the point where regulation of a profession leaves off and prohibitions on speech begin. One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances, is properly viewed as engaging in the practice of a profession."

86 L.Ed.2d 130, 164, 472 U.S. 181, 232.

According to Justice White, therefore, a regulation of professional expression would escape First Amendment scrutiny, only in situations where:

1. The professional takes the affairs of a client personally in hand; *and*

2. The professional purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances.

These criteria are not met in our case.

The review report quoted at pages 6-7 above confirms that all of the financial statements and all information included therein is the representation of management. Moreover, the review report expressly declines to express any opinion concerning the financial statements.

Therefore, it cannot be said that the writer of a review report "takes the affairs of a client personally in hand."

Again, the review report's author nowhere ". . . purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances . . . " as Justice White's criteria would require. Indeed, the review report simply communicates information to third parties and no personalized advice is given either to a third party or to the client. The review report itself acknowledges that it does not express an opinion.

Moreover, Justice White's opinion specifically concurs in the holding of the *Lowe* decision that the publication of *impersonal* advice by a professional may not be pro-

hibited. The review report is designed for third parties and not for the client. Even those things which Justice White felt may be prohibited, properly understood, do not include the statements made in a review report. The accountant does not take the affairs of the client personally in hand or purport to exercise judgment on behalf of the client in the light of his individual needs and circumstances. The accountant makes no statement of advice to the client.

The Court of Appeal, in relying so heavily on Justice White's opinion, misinterpreted that opinion, There is no valid basis for interpreting Justice White's concurrence to mean that any and all regulation of a professional's expression is permitted, notwithstanding the First Amendment, as the Court of Appeal seems to say. Such an interpretation is contrary to the majority opinion in *Lowe* and contrary to the majority opinion in *Riley,* in which Justice White joined.

CONCLUSION

The result of the decision below, if upheld, will mean that no one in Louisiana except a C.P.A. can render *any opinion* regarding financial matters. Those who use unlicensed accountants' services are by and large individuals and small businesses. Petitioners established at trial that it is generally the "Big Eight" C.P.A. firms which handle the accounting business of major corporations. Ordinary citizens and smaller business owners, especially in many of the state's rural parishes, often find it inconvenient and unnecessarily expensive to hire C.P.A.'s to assist them.

We respectfully submit that such a result is contrary to public policy and violates the First Amendment to the constitution of the United States.

HENICAN, JAMES & CLEVELAND

BY: /s/ C. Ellis Henican,Jr.

C. ELLIS HENICAN, JR.
JUDITH E. DECK
111 Veterans Boulevard
Suite 1200
Metairie, Louisiana 70005
Telephone: (504) 837-8080

ATTORNEYS FOR PETITIONERS

APPENDIX A

ACCOUNTANTS' ASSOCIATION OF LOUISIANA, ET AL.	*	NO. CA-4651
	*	COURT OF
	*	APPEAL
VERSUS	*	FOURTH
	*	CIRCUIT
STATE OF LOUISIANA, ET AL	*	STATE OF LOUISIANA

* * *

APPEAL FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 83-6572
HONORABLE RICHARD J. GARVEY, JUDGE

* * *

ROBERT L. LOBRANO
JUDGE

(Court composed of Judges Robert J. Klees, Philip C. Ciaccio and Robert L. Lobrano)

Apr 11 1986

MELANIE SHAW
C. ELLIS HENICAN, JR.
Henican, James & Cleveland
Metairie, La. 70005
FOR PLAINTIFFS/APPELLEES
(Accountant's Association of Louisiana)

KENNETH J. BIALKIN
LOUIS A. CRACO
PHILIP D. CORSI
ROGER D. NETZER
DONALD J. SCHNEEMAN
Willkie, Farr & Gallagher
New York, New York 10022
FOR (American Institute of
Certified Public Accountants)

ROBERT J. CONRAD, JR.
RICHARD A. GOINS
Adams & Reese
New Orleans, La. 70139
FOR DEFENDANT/APPELLANT
(State Board of Certified Public
Accountants of Louisiana)

PHILIP A. WITTMANN
NOEL J. DARCE
Stone, Pigman, Walther,
Wittmann & Hutchinson
New Orleans, La. 70130
FOR (Society of Louisiana
Certified Public Accountants)

REVERSED AND REMANDED

The issue presented for our determination is whether a procedure and its resulting report, termed a "Review", prepared by an unlicensed accountant violates the Public Accountancy Law[1] of Louisiana.

As a result of an adverse declaratory ruling by the State Board of Certified Public Accountants (Board), plaintiffs, the Louisiana Society of Independent Accountants (LSIA) and one of its members, instituted these proceedings seeking a declaratory judgment[2] to invalidate the Board's rules, and to recognize their right to perform the review function.

The trial court held that the review function was not prohibited by the Public Accountancy Law, and that the Board's rules interpreting public accounting were invalid. Because of the result reached, the constitutional issues raised by plaintiffs were not addressed in the lower court.

The practice of public accounting is defined by statute as follows:

> (1) Offering to perform, or performing for the public, accounting or accounting related services while holding one's self out as a certified public accountant or as a firm of certified public accountants; or
>
> (2) Signing or affixing one's own or firm name, or other name used in one's profession or business, to any opinion or certificate attesting in any way to the reliability of any representation or estimate in regard to any person or organization, embracing financial information or facts respect-

---

[1] La. R.S. 37:71-87

[2] See, La. R.S. 49:963

> ting compliance with conditions established by law or contract, including but not limited to statutes, ordinances, regulations, grants, loans and appropriation, together with any wording accompanying or contained in such opinion or certificate which indicates
> (a) that he is an accountant or auditor or that the firm is composed of, or employs, accountants or auditors, or (b) that he has expert knowledge in accounting or auditing or that the firm is composed of or employs persons having expertise in accounting or auditing; or
>
> (3) Offering to the public or to prospective clients to perform, or actually performing on behalf of clients, professional services that involve or require an adult, or examination of financial records leading to the expression of a written opinion concerning same; or
>
> (4) Maintaining an office for the transaction of business as a certified public accountant.
> *La. R.S. 37:72.*

La. R.S. 37:77 provides, in part, that "[n]o person ... shall engage in the practice of public accounting in the State of Louisiana unless he has ... a certified public accountant license. ..." Anyone who violates that statute is guilty of a misdemeanor punishable by a fine of not more than $500.00 or imprisonment for not more than five months, or both. *La. R. S. 37:83.*

In order to carry out the purposes and intents of its Public Accounting Law, the Louisiana legislature created the State Board of Certified Public Accountants, an agency within the Department of Commerce. *La. R. S. 37:73.* Among the duties and powers delegated to the Board is the

authority to "[t]ake appropriate administrative action to regulate the practice of public accounting in the State of Louisiana in the interest of and to preserve and protect the public health, safety and welfare." *La.R.S. 37:75(A)(3).* Further the Board is empowered to "[a]dopt and enforce all rules, regulations, by laws and rules of professional conduct as the Board may deem necessary and proper to regulate the practice of public accounting in the State of Louisiana ..." *La. R. S. 37:77 (A)(2).*

In furtherance of its statutory authority the Board promulgated its rules purporting to interpret the legislative definition of public accounting. Those rules, provide, in part:

> "2.1 The term 'public accounting' as used in the Act shall mean:
>
> 2.1.1 Rendering an accountants' report.
>
> 2.1.2 All services offered or performed for the public by anyone that involves issuing an opinion or certificate attesting in any way to the reliability of the representation; or that involve an audit, examination, review, or compilation of the financial reports leading to a written accountant's report.
>
> 1.2 The term accountant's report shall mean a report:
>
> 1.2.1 Rendering an opinion or statement, or denying an opinion that financial statements or elements thereof are presented, prepared or compiled in accordance with generally accepted accounting principals or any other comprehensive basis of accounting and/or

1.2.2 Refering to an audit, examination, review or lack thereof."[3]

A comparison of the statute and the rules clearly show that the terminology utilized by the Board is different from the language of the legislative act. Most noteworthy is the fact that neither "review" nor "accountant's report" appear in the statutory definition. We must therefore determine, based on the facts before us, what constitutes a review, and whether the Board's definition of public accounting is consistent with the statutory definition.

There are three distinct levels of financial analysis defined by the American Institute of Certified Public Accountants (AICPA), namely, the Audit, the Review and the Compilation. All parties agree that the Audit, the most comprehensive of financial examinations, is prohibited by the statute unless the accountant is licensed. At the other end of the accounting spectrum is the Compilation which merely represents the compiling of information without any assurances given by the accountant. The Compilation is permitted by non-licensed accountants according to the Board's rule 2.2.2.[4]

---

[3] Those rules are codified in the Louisiana Administrative Code (LAC).

[4] LAC 11—9.2.2.2 now reads as follows:

"The compilation of financial statements as long as an accountant's report is not rendered thereon provided, however, that the following shall not constitute an accountants' report:

The accompanying balance sheet of XYZ Company as of December 31, 19XX and the related statements of income, retained earnings, and changes in financial position for the year then ended have been compiled by me (us).

A compilation is limited to preserving in the form of financial statements information that is the representation of management

The Review function is defined by the AICPA as:

> "[p]erforming inquiry and analytical procedures that provide the accountant with a reasonable basis for expressing limited assurance that there are not material modifications that should be made to the statements in order for them to be in conformity with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting."

The standard form of a Review Report prescribed by the AICPA provides:

> "I (we) have reviewed the accompanying balance sheet of XYZ Company as of December 31, 19XX, and the related statements of income, retained earnings, and changes in financial position for the year then ended, in accordance with standards established by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management (owner) of XYZ Company.

(footnote 4 continued)
(owners). I (we) have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance of them.

Use of the following language is permissable in appropriate circumstances:

Management has elected to omit substantially all of the disclosures (and the statement of changes in financial position) required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's financial position, results of operations, and changes in financial position. Accordingly, these financial statements are not designed for those who are not informed about such matters."

> A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, I (we) do not express such an opinion.
>
> Based on my (our) review, I am (we are) not aware of any material modifications that should be made to the accompanying financial statements in order for then to be in conformity with generally accepted accounting principles."[5]

The form utilized by plaintiffs in their review report contains substantially the same language as the AICPA form, with the exception that the phrase "... in accordance with established standards" is substituted for the phrase "... in accordance with standards established by the American Institute of Certified Public Accountants."

The trial court held that plaintiffs review report did not fall within the statutory definition of public accounting because:

1. The person who signs the report does not attest to the reliability of a financial statement, but rather says that all information contained therein is the representation of management and denies any opinion within respect thereto;

2. The financial statement is not shown to have embraced financial information or facts respecting compliance with conditions established by law or contract; and

---

[5] See, *Statement on Standards for Accounting and Review Services - 1* (referred to as SSARS-1)

3. No language in the certificate indicates that its author was an auditor, accountant or employer of same, or that the firm was composed of or employed experts in accounting or auditing.

The Court based its holding on the provisions of La. R.S. 37:72 (A)(2). In brief and oral argument, both parties assert the applicability or non-applicability of the subsection. We do note, however, that the amicus brief of the Society of Louisiana Certified Public Accountants urges that subsection (A)(3) is applicable. Although the language of (A)(3) would appear to prohibit the review function if the term "examination" were to include review, the Board, in its Declaratory Ruling stated that an audit and examination are essentially synonymous.[6] When a statute contains technical world and phrases they "... are to be interpreted according to their received meaning and acceptance with the learned in the art, trade, or profession to which they refer." *La. C.C. Art. 15.* We must assume that the parties to this litigation are learned in accounting terminology. Since they agree than an "examination" equates with an "audit" and since neither party argues the applicablility of same, we conclude that (A)(3) is not applicable to this case.

It is abundantly clear that plaintiffs review falls within the Board's "interpretative" rule, as the rule contains the term, "review". However, we must examine La. R.S. 37:72(A)(2) in detail to determine if the review falls within its meaning.

---

[6] See, Declaratory Ruling dated September 12, 1983 at p. 13.

The fundamental rule of construction is to ascertain and give effect to the intention of the legislature as expressed in the statute. *Clark v. Board of Commissioners,* 422 So.2d 247 (La. App. 4th Cir. 1982). It is presumed that the legislature understood the meaning and effect of the words used in a statute and intended to use those words, that every provision has a useful purpose, and that effect is to be given to each provision. *Spragio v. Board of Trustees,* 468 So.2d 1323 (La. App. 1st Cir. 1985), writs denied, 472 So.2d 32. A statute should be construed according to the fair import of its words taken in their usual sense in connection with the context. La. C.C. Art. 14.

A reasonable interpretation of (A)(2) would require the signing of one's name" ... to any opinion or certificate attesting in any way to the reliability of any representation ... in regard to any person or organization, embracing financial information or facts respecting compliance with conditions established by law or contract, ... including regulations ..., together with any wording accompanying ... such ... certificate which indicates ... that he is an accountant."

We interpret the overall intent of the Public Accounting Law as protecting the public from the expressions of opinion by persons unqualified in the highly technical profession of accounting. All functions prohibited by the statute and the Board's rules involve the expression of an opinion, certification or attestation. La. R.S. 37:72(A)(2) prohibits signing one's name to any opinion or certificate; (A)(3) prohibits professional services leading to an expression of a written opinion; Rule 1.2.1 prohibits rendering an opinion or statement; and Rule 2.1.2 prohibits services that involves issuing an opinion or certificate.[7] Thus, the thrust of our inquiry is to determine if plaintiffs' review function violates the statute's intended prohibition of an

[7] Of course, falsely designating oneself as a CPA is also prohibited.

expression of opinion by non-licensed accountants.

The document submitted in evidence by plaintiffs is headed in capital letters "ACCOUNTANTS' REVIEW REPORT", and is signed by a non-licensed accountant. The concluding paragraph provides that the author is "... not aware of any material modifications that should be made to the accompanying financial statements ... to be in conformity with generally accepted accounting principles."

First, the form clearly indicates that the person who signs it is an accountant. Second, despite plaintiffs' argument to the contrary,[8] we hold that the concluding paragraph is an opinion, attestation or certification. The author of the report clearly attests (or certifies or opines) that he is not aware of any modifications that need be made to the documents he has reviewed to conform to general accounting principles. General accounting principles are defined in the Board's rules as "... those standards promulgated by the Financial Accounting Standards Board and its predecessor entities and similar pronouncements issued by other entities having similar generally recognized authority." *La. Admin. C. 11-9:1.7.*

Considering our interpretation of the overall intent of the Public Accountancy Law, we hold, that insofar as the document entitled "Accountants' Review Report" under consideration in this case is concerned, its use by unlicensed accountants is prohibited by La. R.S. 37:72(A)(2). We also hold that, insofar as they pertain to the review report under consideration herein, the Board's rules are consistent with the statutory definition.

---

[8] Plaintiff argues that it's not an attestation clause, however without its inclusion the Review Report would be meaningless.

The trial court did not decide the constitutional issues raised by plaintiffs. There are factual determinations that must be made based on the evidence presented in order to address those issues. We decline to consider the constitutional issues at this time because we do not have the benefit of the lower court's determination of those facts. We therefore remand to the trial court for its consideration of those issues.[9]

REVERSED AND REMANDED.

REHEARING REFUSED MAY 15 1986

A TRUE COPY
NEW ORLEANS SEP -9 1986 19_____
/s/ S. McCausland
CLERK COURT OF APPEAL
FOURTH CIRCUIT

[9] Should any part of La. R.S. 37:71, et seq. be held unconstitutional by the trial court, the case would be appealable to the Supreme Court. *La. Const. Art. 5, Sec. 5(D).*

APPENDIX B

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 83-06572

DIVISION C
COMM SEC S

FILED
JUL 21 1987

ACCOUNTANTS' ASSOCIATION OF LOUISIANA, ET AL

v.

STATE OF LOUISIANA, ET AL

****

COMMISSIONER'S REPORT

****

STATEMENT OF THE CASE

This matter was returned to the Office of the Commissioners after the matter had been submitted to the Supreme Court of Louisiana on writs. Such Court denied writs which left in effect the ruling of the Fourth Circuit Court of Appeal which 1) held that the CPA board had not acted unconstitutionally when it acted in its proscribed ambit of R.S. 37:72 (A) (2) which prohibit to all but licensed CPAs the confection of "Accountants' Review Reports", and 2) ordered a remand of the matter to rule upon the constitutionality of the CPA act itself. Despite the fact that the parties offered no new testimony as none was needed to determine this latter issue, the remand order remains effective.

OPINION

Such rulings compel a holding at this level on such

statute. The least restrictive approach, based upon board rules, is no longer available, although perhaps alive at the Supreme Court level. This Commissioner is at a loss to determine whether the refusal to grant writs was because a remand had been ordered or whether the substantive ruling was viewed as correct.

If, as the Court of Appeal has ruled, the CPA board has the authority to redraft its rules both with respect to enlarging the definition of "public accounting" and "accountants' report" with respect to the "review" function, it is recommended that the act itself be declared unconstitutional as it respects such function. Such unconstitutionality arises from a violation of La. Const. of 1974, Article 1, Section 7 which states:

> *La. Constitution, Article 1, Section 7*
> No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write and publish his sentiments on any subject, but is responsible for the abuse of that freedom.

It seems to this Commissioner that, with respect to the 'review' function of CPAs which is agreed to be the sole focus of this lawsuit, the CPA Act clearly confronts the above. This is especially true when the curtailment or restraint is founded upon 'limited assurance', and that which the CPA is 'not aware'. Such meaningless verbiage is intended to avoid liability and to carve out another exclusive area of work for licensed CPAs.

Anyone who expresses an opinion in writing relating to figures would fall into the area enclosed exclusively for CPAs. Upon the presentation made no compelling governmental interest has been shown especially as it relates to the 'review' function, which would suffice to override the Constitution.

This is particularly true when an examination of the CPA disclaimers in relation to the 'review' function are made. No reasonable person can determine the scope of the 'limited assurance' or test the 'awareness' of the CPA. In short, such provisions are exceedingly broad and vague. Both require an augur of great skill to make such determinations.

The provisions of the Louisiana Constitution are much more reliable.

The Louisiana Constitution goes beyond protection of opinion. The use of the term 'sentiments', an opinion based upon feeling, clearly shows that the people of our state do not regard limitations as the CPA Act, with reference to 'review' functions, in favorable light.

Both sides to this controversy are to be commended for their presentation and briefs. The plaintiffs' brief is made part hereof for reference to authorities.

July 14, 1987
Respectfully submitted:

/s/ John M. Holahan

JOHN M. HOLAHAN
COMMISSIONER AND JUDGE AD HOC

APPENDIX C

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 83-6572 Division "C" Docket No.5

ACCOUNTANTS' ASSOCIATION
OF LOUISIANA, *Et Al.*

Versus

STATE OF LOUISIANA, Et Al.

Filed: _____ _____
Deputy Clerk

EXCEPTIONS TO
COMMISSIONER'S REPORT

Defendant, the State Board of Certified Public Accountants of Louisiana, by its attorneys, pursuant to La. Rev. Stat.§ 13:1171E-G, excepts to the Commissioner's Report rendered herein on July 14, 1987 (Report), but not served on the undersigned until September 17, 1987, on the following grounds:

1. The opinion of the Judge *Ad Hoc* as expressed in the Report is, and the proposed Judgment of the court would therefore be, erroneous as a matter of law.

2. The findings of fact expressed or implied in the Report are manifestly erroneous and unsupported by the record in this cause.

3. The Report does not conform to the requirements of La. Rev. Stat. § 13:1171D.

4. The Report recommends that the Court declare the Louisiana Public Accountancy Law, La. Rev. Stat. §§ 37:71-87, unconstitutional. Such judgment would judicially abrogate the licensing and regulation of Certified Public Accountants in and by the State of Louisiana, which has existed for nearly 80 years, contrary to the longstanding public policy of this State and contrary to the health, safety and welfare of the citizens of Louisiana.

WEREFORE, pursuant to La. Rev. Stat. § 13:1171G, defendant-exceptor prays that the Court fix a date and time for hearing and argument on the exceptions urged herein and in connection therewith permit the parties hereto to file written briefs on the merits of such exceptions, and after due proceedings be had that the Court sustain defendant-exceptor's exceptions and enter judgment herein dismissing plaintiffs' suit, with prejudice, at plaintiffs' cost.

ADAMS & RESE

By: /s/ Robert J. Conrad, Jr.

ROBERT J. CONRAD, JR.
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Attorneys for Defendant-Exceptor, State Board of Certified Public Accountants of Louisiana

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Exceptions to Commissioner's Report has been duly served upon counsel of record for all parties herein by depositing copies of the same with the United States Postal Service, properly addressed and postage prepaid, this 21st day of September, 1987.

/s/ Robert J. Conrad, Jr.
ROBERT J. CONRAD, JR.

APPENDIX D

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 83-6572 Division "C" Docket No.5

ACCOUNTANTS' ASSOCIANTION
OF LOUISIANA, Et Al.

Versus

STATE OF LOUISIANA, ET Al.

Filed: _____ _____
Deputy Clerk

JUDGMENT

This matter came on for hearing on November 13, 1987 on the exception of defendant, the State Board of Certified Public Accountants of Louisiana, to the Commissioner's Report previously rendered herein, recommending that the Louisiana Public Accountancy Law, R.S. 37:71-87 be declared unconstitutional as respects its definition of "public accounting" (R.S. 37:72(A)(2)).

PRESENT: C. Ellis Henican, Jr.
Attorney for Plaintiffs, the Louisiana Society of Independent Accounts and Dall Hallligan Eden

Robert J. Conrad, Jr.
Attorney for Defendant, the State Board of Certified Public Accountants of Louisiana

Upon consideration of the record herein, the Commissioner's Report, and the briefs and arguments of counsel, the court having been fully advised in the premises, finds the law and evidence to be in favor of defendants and against plaintiffs and concludes that neither R.S. 37:72(A)(2) nor any other provision of the Public Accountancy Law challenged by plaintiffs is unconstitutional (R.S. 37:72(A)(3), R.S. 37:75A(3), R.S. 37:75B(2)), by virtue of which judgment shall be rendered herein rejecting plaintiffs' demand for declaratory judgment. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the exception of defendant, the State Board of Certified Public Accountants of Louisiana, to the Commissioner's Report rendered herein be, and the same is hereby, sustained, and accordingly;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, the State of Louisiana and the State Board of Certified Public Accountants of Louisiana, and against plaintiffs, the Louisiana Society of Independent Accountants and Dall Halligan Eden, denying plaintiffs' petition for judgment declaring R.S. 37:72(A)(2), (3), R.S. 37:75A(3), and R.S. 37:75B(2) unconstitutional and dismissing plaintiffs' petition, with prejudice, at plaintiffs' cost.

JUDGMENT READ, RENDERED AND SIGNED at New Orleans, Louisiana, this 8 day of December, 1987.

/s/ Richard J. Garvey

J U D G E

APPENDIX E

ACCOUNTANTS' ASSOCIATION OF LOUISIANA, ET AL, NO. 88-CA-0419

VERSUS COURT OF APPEAL

STATE OF LOUISIANA, ET AL, FOURTH CIRCUIT
STATE OF LOUISIANA

* * * * * * * * * *

AN APPEAL FROM THE
CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS
NO. 83-6572
HONORABLE RICHARD J. GARVEYJUDGE

* * * * * * * * * *

ROBERT J. KLEES
JUDGE

(Court composed of Judges Jim Garrison, Robert J. Klees and Robert L. Lobrano)

Oct. 27 1988

HENICAN, JAMES & CLEVELAND
C. ELLIS HENICAN, JR.
JUDITH E. DECK
NEW ORLEANS, LOUISIANA 70179
(ATTORNEYS FOR PLAINTIFFS/APPELLANTS)

ADAMS & REESE
ROBERT J. CONRAD, JR.
NEW ORLEANS, LOUISIANA 70139
(ATTORNEY FOR DEFENDANTS-APPELLEES)

AFFIRMED

Plaintiffs seek to have declared unconstitutional certain provisions of the Louisiana Public Accountancy Law (L.J R.S. 37:71 et seq.) which prohibit unlicensed, uncertified accountants from issuing "review reports." The district court upheld the constitutionality of the law, and we affirm.

La. R.S. 37:77 provides that no person shall engage in the practice of public accountancy in this state unless he has a certified public accountant's license. The practice of public accounting is defined as follows:

> (1) Offering to perform, or performing for the public, accounting or accounting related services while holding one's self out as a certified public accountant or as a firm of certified public accountants; or
>
> (2) Signing or affixing one's own or firm name used in one's profession or business, to any opinion or certificate attesting in any way to the reliability of any representation or estimate in regard to any person or organization, embracing financial information or facts respecting compliance with conditions established by law or contract, including but not limited to statutes, ordinances, regulations, grants, loans and appropriation, together with any wording accompanying or contained in such opinion or certificate which indicates (a) that he is an accountant or auditor or that the firm is composed of, or employs, accountants or auditors, or (b) that he has expert knowledge in accounting or auditing or that the firm is composed of or employs persons having expertise in accounting or auditing; or
>
> (3) Offering to the public or to prospective

> clients to perform, or actually performing on behalf of clients, professional services that involve or require an audit, or examination of financial records leading to the expression of a written opinion concerning same; or
>
> (4) Maintaining an office for the transaction of business as a certified public accountant.

La. R.S. 37:72. Violation of the statute is a misdemeanor. La. R.S. 37:83. The statute also creates the State Board of Certified Public Accountants, an agency given the power of regulating the practice of public accounting so as "to preserve and protect the public health, safety and welfare." R.S. 37:75(A)(3). Pursuant to this authority, the Board has promulgated rules indicating that the issuance of a "review report" is included in the statutory definition of "public accounting".

A "review" is one of three distinct types of financial analysis defined by the American Institute of Certified Public Accountants (AICPA), a national association widely recognized as the standard-setting body in the field of public accounting. The other two types are the audit and the compilation. Plaintiffs do not challenge the fact that the audit, the most comprehensive of the three functions, is reserved to licensed CPA's. At the other end of the specturm is the compilation, essentially the gathering of financial information, which non-CPA's are expressly permitted to perform. In between these two is the function at issue here, known as a review. The object of a review is the issuance of a review report. The standard form of such a report, as prescribed by the AICPA, is as follows:

> "I (we) have reviewed the accompanying balance sheet of XYZ Company as of December 31, 19XX, and the related statements of income, retained

> earnings, and changes in financial position for the year then ended, in accordance with standards established by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management (owner) of XYZ Company. A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, I (we) do not express such an opinion. Based on my (our) review, I am (we are) not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles."

Plaintiffs, a group of accountants who are not CPA's, were ordered by the State Board to cease issuing review reports. These reports contained essentially the same language as the AICPA form, except that the phrase "in accordance with established standards" is substituted for the phrase "in accordance with standards established by the American Institute of Certified Public Accountants."

Plaintiffs originally filed suit seeking a declaration that their review reports did not fall within the statute's definition of public accounting, and that the Board's rules were therefore invalid. Alternatively, plaintiffs argued that the statute was unconstitutional. In a prior decision, reversing the trial court, we held that non-CPA's were prohibited from issuing review reports by R.S. 37:72(A)(2).

Accountants' Association of Louisiana v. State, 487 So.2d 155, 159 (La. App. 4th CIr. 1986), *writ denied*, 492 So.2d 1219 (La. 1986). We then remanded the case to the district court for consideration of the constitutional issues. *Id.* at 160. The district court found the statute as applied to be constitutional, and plaintiffs have appealed.

Plaintiffs argue that the statutory prohibition against the issuance of review reports by uncertified, unlicensed accountants violates federal and state constitutional guarantees of freedom of speech, substantive due process, and equal protection. We disagree.

I. *Freedom of Speech*

Plaintiffs' assertion that this statute poses an unconstitutional restriction on speech is without merit. The rendering of financial reports such as an accountant's review report is not so much speech as it is the manner in which the accountant expresses himself in the practice of his profession - just as a lawyer renders legal opinions or a doctor gives a medical diagnosis. There is no question that the states "have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792; 95 S.Ct. 2004, 2016; 44 L.Ed.2d 572, 588 (1975).

We recognize that there is a point at which the state law regulating a profession might pose an impermissible restriction upon speech, but that point is not reached in this case. Justice White has thoroughly examined this problem in a recent concurring opinion:

> This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech. . . .
>
> The power of government to regulate the professions is not lost whenever the practice of a profession entails speech. The underlying principle was expressed by the Court in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 690-691, 93 L.Ed. 834 (1949): "it has never been demed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."
>
> Perhaps the most obvious example of a "speaking profession" that is subject to governmental licensing is the legal professions. Although a lawyer's work is almost entirely devoted to the sort of communicative acts that, viewed in isolation, fall within the First Amendment's protection, we have never doubted that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar...."

Lowe v. S.E.C., 472 U.S. 181, 228, 105 S.Ct. 2557, 2582, 86 L.Ed.2d 130, 162 (1985) (White, J., concurring) (Citing *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957)). Later in the opinion, Justice White very clearly points out the distinction between permissible and impermissible regulations:

> These ideas help to locate the point where regulation of a profession leaves off and prohibits on speech begin. One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the

> client's individual needs and circumstances is properly viewed as engaging in the practice of profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. *If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.* Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation on professional practice with only incidental impact on speech; it becomes a regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Id., 472 U.S. at 232, 105 S.Ct. at 2584, 86 L.Ed.2d at 164 (Footnotes omitted)(Emphasis added). *Louisiana State University*, 477 So.2d 1094 (La. 1985). According to the *Sibley* Court, the appropriate analysis under the state constitution is as follows:

> Article I, Section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, it shall be repudiated completely; (2) When the statute classifies persons on basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the

> classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Sibley, supra, at 1107-1108.

As the Accountancy Law falls into category (3), it will be struck down only if plaintiffs show that "it does not suitably further any appropriate state interest." Our review of the record reveals no such showing by plaintiffs. We find no evidence that the law does not tend to accomplish its objective of protecting clients from potentially being harmed by relying upon the opinions of uncertified accountants. Therefore, we reject plaintiffs' contention that the statute violated the equal protection or "Right to Individual Dignity" provision of the Louisiana Constitution.

Accordingly, for the reasons stated herein, we reject plaintiffs' challenge to the constitutionality of R.S. 37:71 *et seq.* as applied to them, and we affirm the judgment of the district court upholding this law.

AFFIRMED

APPENDIX F

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, **DEC 14 1988**, 198_____

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

ACCOUNTANTS' ASSOCIATION OF LA., ET AL VS. STATE OF LA., ET AL

No. 88-CA-0419

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX G

The Supreme Court of the State of Louisiana

ACCOUNTANTS' ASSOCIATION OF
LOUISIANA, et al

VS. NO. 89-C- 0113

STATE OF LOUISIANA, et al

IN RE: Louisiana Society Indep.Acct.; Eden, Dale; - Plaintiffs(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, number 88CA-0419; Parish of Orleans Civil District Court Div."C" Number 83-6572

— — — — — —

February 24, 1989

Denied.

WFM
JAD
JLD
JCW
HTL
LFC

CALOGERO, J., would grant the writ.

Supreme Court of Louisiana
February 24, 1989

/s/ Frans J. Labranche

Clerk of Court
For the Court

Supreme Court, U.S.
FILED
JUL 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1918

In the Supreme Court of the United States

October Term 1988

LOUISIANA SOCIETY OF INDEPENDENT ACCOUNTANTS and DALL HALLIGAN EDEN,

Petitioners,

Versus

STATE OF LOUISIANA, Through the Attorney General of the State of Louisiana, and the STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS OF LOUISIANA,

Respondents.

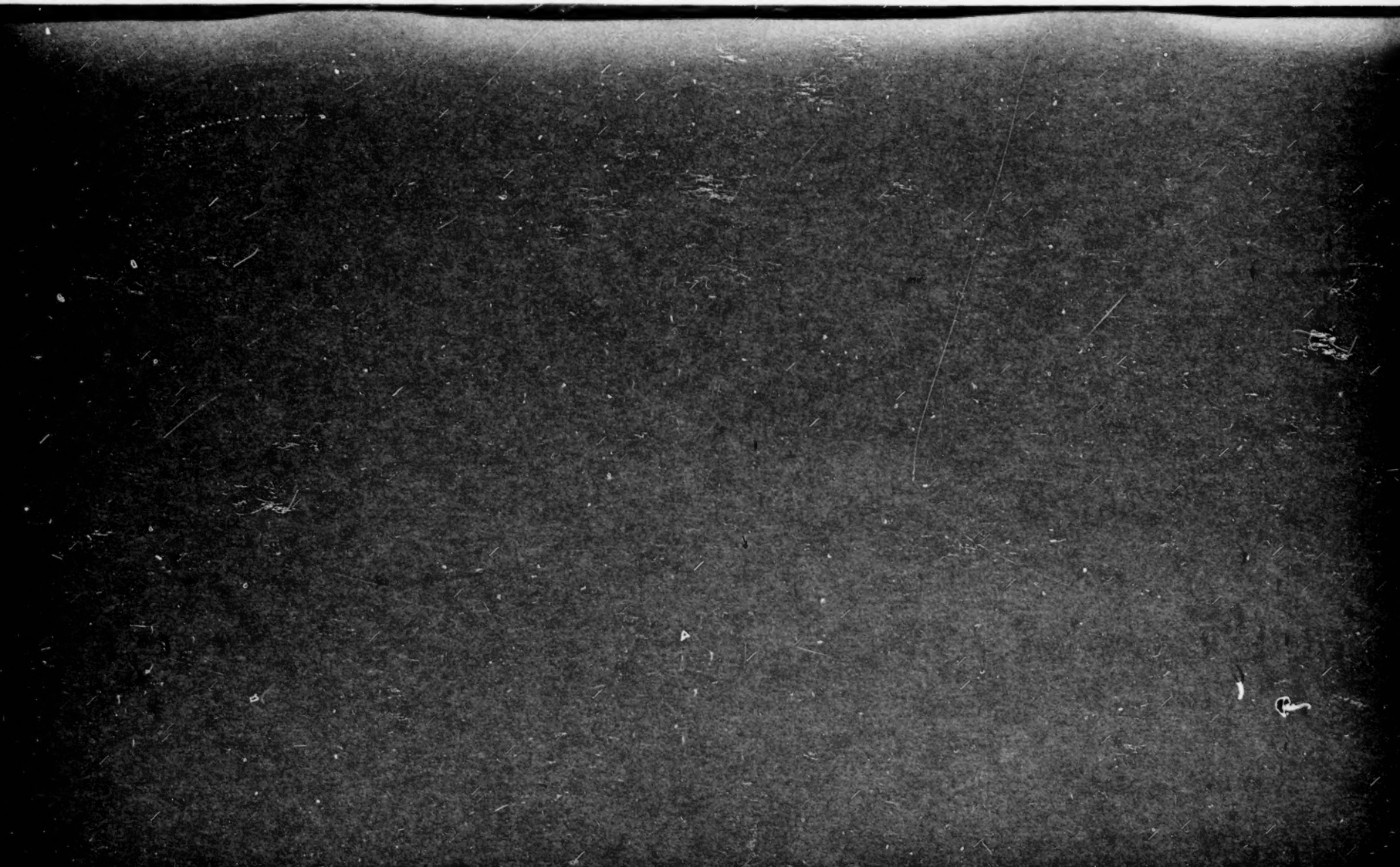
On Petition For Writ of Certiorari
To the Court of Appeal
For the Fourth Circuit,
State of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADAMS & REESE
By: ROBERT J. CONRAD, JR.
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234

Attorneys for Respondent: State Board of Certified Public Accountants of Louisiana

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555



QUESTION PRESENTED FOR REVIEW

The question presented by this case is whether a state's regulation of the profession of public accounting is subject to First Amendment scrutiny simply because the conduct or practice of the profession entails a form of communication.

Table of Contents

	Page
Question Presented For Review	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	2
Restatement of the Case	3
I. The Parties	3
II. The Accountancy Law	4
III. Audit and Review Functions	8
IV. LSIA's Claims	11
Summary of Argument	12
Argument	13
Conclusion	19

Table of Authorities

Page

CASES

Accountants' Ass'n of Louisiana v. *State of Louisiana*, 487 So.2d 155 (La. App. 4th Cir.), *cert. denied*, 492 So.2d 1219 (La. 1986) 5, 11

Accountants' Ass'n of Louisiana v. *State of Louisiana*, 533 So.2d 1251 (La. App. 4thCir. 1988), *writ den.*, ___ So.2d ___ (La.,Feb. 24, 1989) 2, 12

Accountant's Soc'y of Virginia v. *Bowman*, 860 F.2d 602 (4th Cir. 1988) 2, 16

Accountants' Society of Virginia v. *Bowman*, No. 84-0376-R, Slip Op. (E.D. Va., Feb. 1, 1988) 15

Davis v. *Allen*, 307 S.W.2d 800 (Tenn. 1957) 5

Elliott v. *University of Illinois*, 6 N.E.2d 647 (Ill. 1936) 5

Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) 13

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 18

Joslin v. *Secretary of Dept. of Treasury*, 616 F. Supp. 1023 (D. Utah 1985) 15

Lowe v. *S.E.C.*, 472 U.S. 181 (1985) 14, 14 n16

Mercer v. *Hemmings*, 170 So.2d 33 (Fla. 1965) 5

Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) 14

People v. *Hill*, 136 Cal. Rptr. 30 (Cal. 1977) 5

People v. *Marlowe*, 203 N.Y.S. 474 (N.Y. 1923) 5

Schware v. *Board of Bar Examiners*, 353 U.S. 232 (1957) 14

State v. *DeVerges*, 153 La. 349, 95 So. 805 (1923) 5

Texas State Board of Public Accountancy v. Tulcher, 515 S.W.2d 950 (Tex. 1974) 5

STATUTES AND REGULATIONS

LA. REV. STAT. ANN. §§ 37:71-87 (West 1988) 4 n5

LA. REV. STAT. ANN. § 37:72(A) 6, 11

LA. REV. STAT. ANN. § 37:75(B)(2), (3) 5, 7

LA. REV. STAT. ANN. § 37:75(B)(4) 5

LA. REV. STAT. ANN. § 37:77(B) 5

LA. REV. STAT. ANN. § 37:78 7

LA. REV. STAT. ANN. § 37:78(B)(2) 5

LA. REV. STAT. ANN. § 37:79 7

LA. REV. STAT. ANN. § 37:82(C)(2) 7

LA. REV. STAT. ANN. § 37:84(A) 7

3 LA. ADMIN. C. §§ 46:XIX.101(B), 103(A) (1986) ... 11

OTHER AUTHORITIES

Am. Inst. Cert. Pub. Accountants, PROFESSIONAL STANDARDS, UNITED STATES AUDITING STANDARDS (Jun. 1, 1983) 9, 10

Acctg. & Rev. Serv. Comm., AICPA Statement on Standards for Accounting and Review Services/1, *Compilation and Review of Financial Statements* (Dec. 1978) 9

In The
Supreme Court of the United States

October Term 1988

LOUISIANA SOCIETY OF INDEPENDENT ACCOUNTANTS and DALL HALLIGAN EDEN,

Petitioners,

Versus

STATE OF LOUISIANA,
Through the Attorney General
of the State of Louisiana, and the
STATE BOARD OF CERTIFIED PUBLIC ACCOUNTANTS
OF LOUISIANA,

Respondents.

On Petition For Writ of Certiorari
To the Court of Appeal
For the Fourth Circuit,
State of Louisiana

Louisiana, in common with all other states, regulates the profession of public accounting, restricting its practice to those who, by education and examination, have demonstrated the professional competency requisite to certification and licensing. Petitioners here—an individual incapable or unwilling to secure state licensing as a certified public accountant and an organization of such individuals—seeking to escape such regulation, and having unsuccessfully urged and subsequently abandoned a host of insubstantial theories, cling to a patently fallacious notion: that, since a component of practicing public

accounting involves the communication of an opinion, the regulation of public accounting by Louisiana is impermissible under the First Amendment.

In an opinion which petitioners now urge this Court to review, a Louisiana appellate court correctly rejected the suggestion that freedom of expression is implicated by state regulation of public accountancy. *Accountants' Ass'n of Louisiana* v. *State of Louisiana*, 533 So.2d 1251 (La. App. 4th Cir. 1988). On the same day, in a virtually identical case brought by petitioner's sister association in Virginia, a Federal appellate court in reached the same result. *Accountant's Soc'y of Virginia* v. *Bowman*, 860 F.2d 602 (4th Cir. 1988). No other decision by any state court of last resort or any federal court stands in conflict with these decisions. Both decisions, and their rationale, are entirely consistent with the decisions of this Court.

This brief, accordingly, is submitted on behalf of the State Board of Certified Public Accountants of Louisiana (Board), respondent, in opposition to the petition for writ of certiorari filed herein by the Louisiana Society of Independent Accountants and Dall Halligan Eden. Under Rule 17 or otherwise, this case simply does not warrant the Court's attention.

OPINION BELOW

The instant petition for writ of certiorari is prosecuted from the opinion of the Louisiana Fourth Circuit Court of Appeal, issued October 27, 1988, *Accountants' Ass'n of Louisiana* v. *State of Louisiana*, 533 So.2d 1251 (La. App. 4th Cir. 1988), *writ denied*, ___ So.2d ___ (La., Feb. 24, 1989). The opinion is referenced with the observation that its reproduction by

Petitioners in the Appendix of their petition herein[1] omits a substantial portion of the Louisiana appellate court's opinion.[2]

RESTATEMENT OF THE CASE

To frame the issue presented as it does, LSIA must necessarily distort and grossly misrepresent both the nature of its claims and the rulings of the courts below. The Board is regrettably compelled, then, to restate the case, more fully and objectively than as presented by petitioners. In doing so, we believe it appropriate to review the factual and legislative landscape against which this action is set, the specific relief sought by petitioners, and the nature of their residual "constitutional" claim.

I. The Parties

The Louisiana Society of Independent Accountants (LSIA),[3] petitioner here, represents itself as a "Louisiana non-profit corporation" whose "members . . . are citizens of

---

[1]Petition for Writ of Certiorari, Louisiana Soc'y of Indep. Accountants, *Et Al.* v. State of Louisiana, *Et Al.*, No. 88-1918, Appendix E, at A-21 (U.S., filed May 24, 1989) [hereinafter cited as LSIA Petition].

[2]The omission occurs at LSIA Petition, App. E, at A-27, following the quoted material citation. The omitted portion of the opinion appears at 533 So.2d at 1255-56.

[3]When originally instituted, this action was brought on behalf of the Accountants' Association of Louisiana (AAL) and Durham, Rohr & McDaniel, a partnership. By amended pleadings filed shortly prior to trial, AAL advised that it had adopted a new name, the Louisiana Society of Independent Accountants, the partnership withdrew as a party, and Dall Halligan Eden was substituted.

Louisiana and engaged in the practice of accounting . . . , but who do not hold certificates as certified public accountants from the State of Louisiana . . . ."[4] Dall Halligan Eden is apparently a member of LSIA and, as such, an individual who offers to provide accounting services but is not a certified public accountant. Petitioners thus represent a group of individuals who represent that they practice some form of accounting without any certification or license and hence without regulation by any state agency, never having taken—or having taken and failed—the public accountancy certification examination administered by the State.[5]

The Board, respondent here, is an administrative agency of the State of Louisiana, constituted under and charged with administration and enforcement of the Louisiana Public Accountancy Law (Accountancy Law).[6] Such law vests in the Board various powers typical of administrative agencies, which are said to exercise quasi-executive, quasi-legislative and quasi-judicial authority, or enforcement, rulemaking and adjudicative powers.

II. The Accountancy Law

The State of Louisiana, along with every other state in the nation, has long recognized the practice of public accounting as a highly skilled and technical profession imbued with the public interest and affecting the public welfare. Historically—as with law, medicine, and the other professions—public accounting has been subject to regulation by Louisiana and

---

[4]Petition for Declaratory and Injunctive Relief at 1-2, *Accountants' Association of Louisiana, Et Al.* v. *State of Louisiana, Et Al.*, No. 83-6572 (Civ. D. Ct., Orl. Par., filed Apr. 20, 1983) [hereinafter cited as Trial Court Petition].

[5]Ms. Eden, for example, has, according to Board records, sat for the Uniform CPA Examination on seven occasions, but never successfully passed.

[6]LA. REV. STAT. ANN. §§ 37:71-87 (West 1988).

other states, in the exercise of their police power, to ensure that those holding themselves out as experts in accounting are qualified in fact to do so. See *State* v. *DeVerges,* 153 La. 349, 95 So. 805 (1923); *Accountants' Ass'n of Louisiana* v. *State of Louisiana,* 487 So.2d 155 (La. App. 4th Cir. 1986);[7] see also *People* v. *Hill,* 136 Cal. Rptr. 30 (Cal. 1977); *Texas State Board of Public Accountancy* v. *Fulcher,* 515 S.W.2d 950 (Tex. 1974); *Mercer* v. *Hemmings,* 170 So.2d 33 (Fla. 1965); *Davis* v. *Allen,* 307 S.W.2d 800 (Tenn. 1957); *People* v. *Marlowe,* 203 N.Y.S. 474 (N.Y. 1923); *Elliott* v. *University of Illinois,* 6 N.E.2d 647 (Ill. 1936).

Public accounting has been regulated by Louisiana since 1908 through laws defining the profession, prescribing minimum standards for and requiring certification, and establishing an administrative agency, the Board, to implement such prescriptions.[8] In its contemporary embodiment, the Accountancy Law vests in the Board authority to prescribe educational standards for certification, La. Rev. Stat. § 37:78(B)(2); administer a competency examination, La. Rev. Stat. § 37:75(B)(4); and prescribe rules governing professional conduct and requiring continuing professional education, La. Rev. Stat. § 37:75(B)(2), (3).

The axis of the Accountancy Law is its pronouncement that "[n]o person . . . shall engage in the practice of public accounting in the state of Louisiana unless he has in his personal possession a current certified public accountant license issued under [the Law]." La. Rev. Stat. § 37:77(B). This prohibition is given content by the Accountancy Law's specifi-

---

[7]"We interpret the overall intent of the Public Accounting Law as protecting the public from the expressions of opinion by persons unqualified in the highly technical profession of accounting." 487 So.2d at 159.

[8]Acts 1908, No. 125, *as amended by* Acts 1912, No. 247; Acts 1924, No. 136, *as amended by* Acts 1950, No. 497; Acts 1968, No. 427; Acts 1970, No. 192, *as amended and reenacted by* Acts 1979, No. 510, *as amended by* Acts 1984, No. 747.

cation that the "practice of public accounting" or "practicing public accounting" embraces:

> (1) offering to perform, or performing for the public, accounting or accounting related services while holding one's self out as a certified public accountant or as a firm of certified public accountants; or
>
> (2) signing or affixing one's own or firm name, or other name used in one's profession or business, to any opinion or certificate attesting in any way to the reliability of any representation or estimate in regard to any person or organization, embracing financial information or facts respecting compliance with conditions established by law or contract, including but not limited to statutes, ordinances, regulations, grants, loans, and appropriations, together with any wording accompanying or contained in such opinion or certificate which indicates (a) that he is an accountant or auditor or that the firm is composed of, or employs, accountants or auditors, or (b) that he has expert knowledge in accounting or auditing or that the firm is composed of or employs persons having expertise in accounting or auditing; or
>
> (3) offering to the public or to prospective clients to perform, or actually performing on behalf of clients, professional services that involve or require an audit, or examination of financial records leading to the expression of a written opinion concerning same; or
>
> (4) maintaining an office for the transaction of business as a certified public accountant.

La. Rev. Stat. § 37:72(A).[9]

In common with many other states, the Louisiana law

---

[9]The statutory definition of public accounting further expressly excludes from its scope bookkeeping services and the preparation of tax returns, provided that the bookkeeper or preparer does not identify himself as a Certified Public Accountant, or C.P.A.

embodies a two-tier licensing scheme under which a public accountant must be both certified and licensed in order to engage in the practice of public accounting. Certification as a Certified Public Accountant (CPA) may be attained upon meeting age, character and accounting education requirements and successfully passing an examination administered by the Board. La. Rev. Stat. § 37:78. A CPA. is not entitled to practice as such, however, until licensed, see La. Rev. Stat. § 37:78(B), for which a CPA. becomes qualified by evidencing a prescribed period of professional experience. La. Rev. Stat. § 37:79.

Once licensed, a Certified Public Accountant's maintenance of licensure is subject to satisfaction of mandatory continuing professional education requirements adopted by the Board, La. Rev. Stat. § 37:82(C)(2) (see also La. Rev. Stat. § 37:75(B)(3)) and to observance of rules of professional conduct enforced by the Board. Certification and licensing, moreover, is subject to suspension or revocation by the Board for certain causes enumerated by the Accountancy Law, including "[p]rofessional incompetency," "[e]fforts to deceive or defraud the public," "[r]endering . . . false, deceptive, misleading or unfounded opinions or audits," and "[v]iolation of . . . any rules or regulations of the board or rules of professional conduct promulgated by the board." La. Rev. Stat. § 37:84(A).

The Accountancy Law, in short, imposes a comprehensive regulatory structure on the practice of public accounting which demands not only an initial demonstration of educational qualifications and professional experience, but ongoing observance of professional standards and continuing education under the superintendence of a state agency. In doing so, the law protects the public against the incompetent, unprofessional practice of the profession with its potentially devastating consequences.

III. Audit and Review Functions

From the outset, the focus of this case has been whether an uncertified, unlicensed person may perform a "Review," a financial accounting function which obtains a particular meaning in the profession of public accounting. It is important, then, to understand precisely what the term signifies.

While a public accountant or CPA firm may provide a spectrum of accounting, managerial and consulting services to clients, at the core of the practice of the profession is the public accountant's examination and analysis of financial data and systems and the rendition of an objective, impartial and independent expert opinion or assurance concerning the reliability of such information. Such financial data and the accompanying accountant's report have crucial significance in our national economy, for they are used and relied on by all forms of investors—individual, institutional and governmental—creditors, regulatory governmental agencies and others in making myriad financial decisions which from day to day shape the economic course of the nation.

An Audit and a Review represent but two different levels of financial data analysis and two levels of assurance. What each connotes is defined by the American Institute of Certified Public Accountants (AICPA), a national association which, through its technical committees, is recognized by the profession, by business and industry, and by government, as the authoritative standard-setting body in the field of financial accounting.

An Audit, of course, contemplates a comprehensive examination of financial information, in accordance with detailed standards and procedures, to provide a basis for, and resulting in, the expression of an opinion regarding an entity's financial statements taken as a whole. The objective of an Audit, or examination, of financial statements is said to be "the expression of an opinion on the fairness with which they present financial position, results of operations, and changes in

financial position in conformity with generally accepted accounting principles." Vol. A, AICPA, Professional Standards, United States Auditing Standards § 110.01, at 61 (Jun. 1, 1983).

A Review of financial statements represents an intermediate level of analysis and assurance, being formally defined to consist of

> [p]erforming inquiry and analytical procedures that provide the accountant with a reasonable basis for expressing limited assurance that there are not material modifications that should be made to the statements in order for them to be in conformity with generally accepted accounting principles or, if applicable, with another comprehensive basis of accounting.

See Acctg. & Rev. Serv. Comm., AICPA Statement on Standards for Accounting and Review Services/1, *Compilation and Review of Financial Statements* 3 (Dec. 1978) [hereinafter cited as SSARS-1], incorporated in AICPA Professional Standards, *supra*, § 100.04, at 3313.[10]

A Review, then, is qualitatively similar to an Audit, in that both are conducted in accordance with recognized and prescribed standards and procedures for field work and reporting, and both result in the expression of a form of assurance on the reliability of the examined or reviewed financial statements. The representation that an accountant has

---

[10]A "Compilation" of financial statements, in contrast, is defined as "[p]resenting in the form of financial statements information that is the representation of management (owners) without undertaking to express any assurance on the statements." *See* SSARS-1. In undertaking a Compilation of financial statements, thus, an accountant does not perform such investigation, inquiry and analytical procedures as would provide a basis for any expression or implication of assurance as to the reliability of such statements. Rather, a Compilation merely represents the assembly, or "compiling," of information provided to the accountant in the form of financial statements.

performed a Review carries with it the implicit warranty that such recognized standards and procedures have been applied. Signifying that this is the case is the standard form of accountant's Review Report, prescribed by the AICPA for use by certified public accountants:

> I (we) have reviewed the accompanying balance sheet of XYZ Company as of December 31, 19XX, and the related statements of income, retained earnings, and changes in financial position for the year then ended, in accordance with standards established by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management (owners) of XYZ Company.
>
> A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, I (we) do not express such an opinion.
>
> Based on my (our) review, I am (we are) not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.

AICPA, Professional Standards, *supra*, § 100.35, at 3321. Because this form of report is prescribed by the AICPA and is uniformly employed by certified public accountants, its significance and meaning go well beyond its literal expression. Those reading and relying on an accountant's Review Report are entitled to and do have the expectation and understanding that the Review was conducted and reported in accordance with AICPA standards and has the meaning ascribed to it by the AICPA.

As interpreted by the Board's rules, both the Audit and the Review functions are clearly reserved to licensed certified

public accountants by the Accountancy Law. 3 La. Admin. C. §§ 46:XIX.101(B), 103(A) (1986).

IV. LSIA's Claims

The specific purpose animating this action by the LSIA and one of its members has been and is to secure for LSIA members—who "do not hold certificates as certified public accountants"[11]—the right to perform a Review and render a report relative to financial statements. LSIA specifically seeks a judgment "decreeing that . . . [u]ncertified accountants and members of [LSIA] may render reviews . . . of financial records leading to written accountants' reports . . . ."[12] Thus, LSIA seeks to invalidate as unconstitutional the Accountancy Law's definition of public accounting, insofar as it operates to embrace the Review function and thereby reserve its performance to certified public accountants, La. Rev. Stat. §§ 37:72A(2), (3).

Petitioners' initial challenge to the law advanced a desultory array of statutory and federal and state constitutional claims, questioning both the validity of Board regulations recognizing the Review function as central to the practice of public accounting and, alternatively, attacking the Accountancy Act itself. In its first examination of the case, the state appellate court, reversing the trial court, held that the Accountancy Law had been properly interpreted by the Board to prohibit uncertified persons from undertaking to perform and report on a Review of financial statements. *Accountants' Ass'n of Louisiana* v. *State of Louisiana*, 487 So.2d 155 (La. App. 4th Cir.), *cert. denied*, 492 So.2d 1219 (La. 1986). Because the trial court had not passed on petitioners' myriad constitutional claims, the case was remanded to that court for

---

[11] *See* Trial Court Petition ¶ 1, at 1-2.

[12] Trial Court Petition 11.

its disposition of those issues.[13]

There LSIA renewed its assault on the Accountancy Law itself, abandoning most of the theories previously urged, but maintaining claims that the law, as applied to them effected an impermissible infringement on their freedom of expression, due process and equal protection rights under Louisiana and Federal Constitutions. The district court rejected such claims, sustaining the constitutionality of the Accountancy Law.[14] The same claims were renewed on appeal, and again rejected. *Accountants' Ass'n of Louisiana* v. *State of Louisiana*, 533 So.2d 1251 (La. App. 4th Cir. 1988).

SUMMARY OF ARGUMENT

A state's regulation of the profession of public accounting is not subject to First Amendment scrutiny simply because the conduct or practice of the profession entails a form of communication. "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, or carried out

---

[13]Contrary to petitioners' oft-repeated misrepresentation, the case was certainly not remanded to give the Board a "chance to meet [the] heavy burden" of establishing a "compelling state interest." *See* LSIA Petition 11, 14. The appellate court gave absolutely no indication that it gave any credence whatsoever to LSIA's notion that the Accountancy Law was suspect on First Amendment grounds.

[14]Judgment, *Accountants' Association of Louisiana, Et Al.* v. *State of Louisiana, Et Al.*, No. 83-6572 (Civ. D. Ct., Orl. Par., Dec. 8, 1987), reproduced at LSIA Petition, App. D, at A-19.

by means of language, either spoken or written."[15]

ARGUMENT

LSIA's argument that its members' performance of the Review function and rendition of Review reports is protected by the constitutional free speech guarantee is, in the end unalloyed constitutional nonsense. The fact that an element of commercial conduct may give rise to a form of expression does not constitute the expression as a form of speech—political, commercial or otherwise—that is entitled to constitutional protection. Nor does it place such conduct beyond the pale of state regulation. LSIA's claim in this respect, that is to say, is no different from the claim that one need not be a licensed member of the bar to render a legal opinion or that one need not be licensed as a physician to render a medical diagnosis. In either instance, the practice of law or the practice of medicine may take the form of an oral or written expression, but no court has ever questioned the legislature's right to prevent unlicensed persons from engaging in such conduct.

The constitutional guarantee of free speech is simply not implicated by such laws and is not implicated in this case. That this is so as a matter of First Amendment, free speech analysis, is well-established. As explained by Justice White,

> The power of government to regulate the professions is not lost when the practice of a profession entails speech. The underlying principle was expressed by the Court in Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 98 L.Ed. 834, 69 S.Ct. 864 (1949): "*it has never been deemed an abridgement of freedom of speech or*

---

[15]Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

> *press to make a course of conduct illegal merely because the conduct was in part initiated, or carried out by means of language, either spoken, written, or printed.*"
>
> Perhaps the most obvious example of a "speaking profession" that is subject to governmental licensing is the legal profession. Although a lawyer's work is almost entirely devoted to the sort of communicative acts that, viewed in isolation, fall within the First Amendment's protection, we have never doubted that a State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." Schware v. Board of Bar Examiners, [353 U.S. 232, 239, 1 L.Ed.2d 796, 77 S.Ct. 752 (1957)].

Lowe v. *S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring; emphasis supplied); see also *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456-57 (1978). These principles, it was observed, locate the point at which regulation of a profession leaves off and prohibitions on speech are implicated:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. *If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.*

Lowe, supra, 472 U.S. at 232, 86 L.Ed.2d at 164 (footnote

omitted; emphasis supplied).[16]

The case at bar most certainly presents an instance in which the state legislature has enacted "generally applicable provisions limiting the class of persons who may practice the profession" of public accounting, as defined by the Accountancy Law. That Law, accordingly, "cannot be said to have enacted a limitation on freedom of speech or the press" subject to constitutional free speech scrutiny. This critical distinction, which LSIA attempts valiantly to obscure, has nonetheless been recognized and applied by the courts in confronting similarly-based challenges to state regulation of professions and trades. See, *e.g.*, *Joslin* v. *Secretary of Dept. of Treasury*, 616 F. Supp. 1023 (D. Utah 1985) (sustaining constitutionality of regulations governing the standards of practice of attorneys who render opinions on tax shelter offerings). Most pertinent here is the recent opinion of a Virginia Federal District Court, rejecting the claims of LSIA's parallel association that the Virginia accountancy statutes abridged their freedom of speech by, *inter alia*, prohibiting all but Certified Public Accountants from performing and reporting on Reviews. The court held regulation of such services, which "consist of preparing reports and statements reflecting the financial condition of their clients for client and third-party use," constitute "regulations of a profession, not

---

[16]Conversely, of course,

> [w]here the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Lowe v. *S.E.C.*, 472 U.S. at 232 (footnote omitted).

restrictions on protected speech." *Accountants' Society of Virginia, Inc., Et Al.* v. *Earl J. Bowman, Et Al.*, No. 84-0376-R, Slip Op. at 4 (E.D. Va., Feb. 1, 1988).

In affirming, the Fourth Circuit Court of Appeals rejected the contention, urged here by Petitioners, that the district court had erroneously relied upon *Lowe* v. *S.E.C., supra,* and similarly rejected the accountants attempted portrayal of the "preparation of financial reports by non-CPAs as analagous to speech or publications addressing the general public." *Accountant's Soc'y of Virginia* v. *Bowman*, 860 F.2d 602, 603, 604 (4th Cir. 1988).[17]

LSIA's attempts to bring its members complaint under freedom of speech scrutiny are, in the end, predicated on two fundamental fallacies which permeate its argument, and on selective extraction, out of context, of statements appearing in cases having nothing whatsoever to do with freedom of speech analysis. As a first matter, thus, as evidenced by the emphasis it is given, LSIA attaches undue significance to the distinction between the performance of the Review function and the rendering of a Review report, and the fact that the Accountancy

---

[17]The Fourth Circuit observed that

> non-CPAs undoubtedly perform personal services for their clients. They exercise their professional judgment in making individualized assessments of each client's financial situation, for which they are compensated by the client. While the information compiled by accountants and bookkeepers may be directed at third parties, it is not aimed at the general public. Rather, such information typically is used by lenders and insurers and has been prepared and circulated for the pecuniary benefit of the client, who has paid the accountant to prepare it. Clearly the relationship between accountant and client gives rise to "a personal nexus between professional and client." Lowe, 472 U.S. at 232, 105 S.Ct. at 2584. The [Virginia accountancy law] in question restricts only accountants' communications with and on behalf of their clients, as a means of regulating the professional activities of non-CPAs.

860 F.2d at 604-05.

Law expressly prohibits the latter, but not the former. LSIA's apparent theory is that uncertified accountants may not constitutionally be prevented from reporting on an activity which the law permits them to engage in.

This distinction is, and always has been, meaningless. The entire purpose of undertaking the inquiry and analytical functions of a Review is to enable the accountant to express a level of assurance on financial statements in the form of a Review report. In artificially distinguishing the "performance of a Review" from the rendering of a Review report, LSIA effectively isolates an inchoate activity. The distinction and the argument is akin to the suggestion that, as it is not illegal for any person to engage in legal research—*e.g.*, reading of statutes and jurisprudence—the rendering of legal opinions should be constitutionally protected and not restricted to persons who have met governmental requirements for admission to the bar. LSIA's position would have equal applicability to the practice of medicine, if one were to distinguish between the physical acts predicate to rendering a diagnosis, and the expression of a medical diagnosis itself. In these areas, as it is with public accounting, statutory law properly focuses on the end result of the predicate activities, rather than the predicate activities themselves. The fact that the two may be semantically and artificially separated does not have any implication for the government's right to regulate the profession without abridging freedom of speech.

It bears special observation and emphasis, moreover, that the Accountancy Law does not, as Petitioners may suggest, prohibit the expression of Review reports or act as a prior restraint. Lost among LSIA's ruminations is the fact that Review reports are not prohibited, they are only regulated. That is to say that anyone who, by education and testing, demonstrates the level of competence requisite to certification and licensure, may lawfully render a Review report. Petitioners are prohibited from rendering such reports not by virtue

of a legal prohibition on their engagement in a profession, or upon their exercise of free speech rights, but because they will not, or cannot, demonstrate the proficiency demanded as a matter of governmental policy to protect the public health, safety and welfare.[18]

Finally, even were it assumed *arguendo* that the expression of an opinion or the giving of an assurance with respect to financial statements constitutes a form of commercial speech, it is well-established that such "speech" is subject to regulation to promote legitimate governmental interests. And it is certain that the State of Louisiana has a substantial interest in the regulation of professions, including public accounting. As put by the Court, the states

> have a *compelling interest* in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety and other valid interests they have *broad power to establish standards for licensing practitioners and regulating the practice of professions*.

Goldfarb v. *Virginia State Bar*, 421 U.S. 773, 792 (1975) (emphasis supplied). Every licensing law enacted within the contours of such power affects the capacity of unlicensed persons to engage in conduct or express opinions within the regulated discipline. It may be seen, then, that LSIA's claim here, though presented as a narrow attack on a specific function, is nothing less than a facial challenge to the very notion of professional licensing. That challenge has been consistently rejected in the past. It should again be rejected by this Court.

---

[18]If LSIA's unstated assertion in fact is that the standards erected by the Accountancy Law are themselves unjustifiably rigorous, that is a political, not a constitutional question, which should be addressed to the Louisiana Legislature, not to the courts.

CONCLUSION

For the foregoing reasons, the State Board of Certified Public Accountants of Louisiana respectfully urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

ADAMS & REESE
By: ROBERT J. CONRAD, JR.
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234

Attorneys for Respondent:
State Board of Certified Public Accountants of Louisiana